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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1443

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL., *Petitioners,*

v.

JOHN T. DUNLOP, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION ET AL., IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 506 F.2d 385. The opinion was issued in three consolidated cases (petitions for review) brought by three different groups of petitioners to review a set of regulations promulgated by the Assistant Secretary of Labor for Occupational Safety &

Health.[1] The Court of Appeals had issued an earlier opinion in a closely-related segment of one of these same three consolidated cases. This earlier opinion is reported at 503 F.2d 1155. The bifurcated nature of the proceedings in the Third Circuit came about after the three groups of petitioners and OSHA had joined together in a stipulation and motion to consolidate the cases. A Motion for Stay of the portion of the OSHA regulations pertaining to ethyleneimine ("EI") was made. During a hearing on the Motion for Stay, the Court of Appeals *sua sponte* ordered that the portion of the regulations subject to the stay motion be considered on an expedited basis and be severed from the rest of the consolidated cases. The expedited and severed portion of the cases was subject of the first opinion of the Court of Appeals. Thereafter, a petition for writ of certiorari was taken from the first opinion; the petition was denied by this Court on March 17, 1975.[2]

The rulemaking order promulgating the regulations (29 C.F.R. §§ 1910.93*c-p*) is found at 39 *Fed. Reg.* 3756 (January 29, 1974), and is also set out in Appendix B to the Petition filed in this case.

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[1] The Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.* is written in terms of a grant of authority to the Secretary of Labor. The Secretary has delegated his responsibilities under the Act to the Assistant Secretary of Labor for Occupational Safety & Health. For purposes of simplicity, this brief will henceforth use the terms "the Secretary" or "OSHA" to refer both to the authority granted by the Act and to the actual official who promulgated the regulations.

[2] *Synthetic Organic Chemical Mfrs. Ass'n* v. *Brennan*, No. 74-789. Concurrently with this Brief in Opposition, the SOCMA respondents are filing a conditional Petition for Rehearing of the Order Denying Certiorari in No. 74-789.

JURISDICTION

The jurisdictional requisites are adequately set out in the Petition.

QUESTIONS PRESENTED

1. Whether OSHA in promulgating similar occupational health regulations for each of fourteen chemicals said to be carcinogens or to have a carcinogenic "potential",[3] could rely largely on "work practice" requirements, in contrast to "performance" requirements.

2. Whether it was "appropriate" under the Act for OSHA to defer inclusion of provisions for monitoring in standards for particular chemicals pending technological development and identification of monitoring measures.

STATUTE INVOLVED

Petitioners have set out as Appendix C to their Petition paragraphs 6(b)(5) and 6(b)(7) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 655(b)(5), (b)(7). Section 6 of the Act in its entirety seems pertinent to this Petition; Section 6 is set out as Appendix A to this Brief, *infra,* at 1a.

STATEMENT OF THE CASE

The regulations involved in the present Petition are "permanent" regulations promulgated under subsec-

[3] OSHA based regulation of some of the chemicals such as ethyleneimine ("EI") upon a finding of "carcinogenic potential" (see Pet. Appx., at 18a), and not upon a finding of carcinogenicity in man. The validity of OSHA's finding of such a "potential" especially as tested against its own criterion for making such a finding, was addressed in the earlier portion of this case to reach this Court. *Synthetic Organic Chemical Mfrs. Ass'n* v. *Brennan,* No. 74-789, *cert. denied,* — U.S. —, 95 S. Ct. 1396 (1975).

tion 6(b) of the Act. These regulations were, however, preceded by so-called "emergency temporary standards" issued by OSHA under subsection 6(c) of the Act. The positions of the parties at this juncture can best be understood and assessed by a brief review of the entire chain of events leading to the decision of the Court of Appeals for which review is being sought. Petitioners have set out the regulation for EI (29 C.F.R. § 1910.93*l*) as an example of regulations issued for each of the fourteen chemicals and have made various references to EI in their Petition. Therefore, specific references will be made in the following statement to the steps taken respecting EI at various stages in the proceeding.

A. The Emergency Temporary Standard

OSHA began examining the prospective regulation of certain suspected occupational carcinogens as early as the first part of 1972.[4] In May, 1972, OSHA wrote to the National Institute of Occupational Safety and Health ("NIOSH") requesting "all available information of known carcinogens used in industry"—noting specifically nine chemicals not including EI—and requesting "your recommendations for handling these substances with regard to writing standards".

NIOSH, an agency in the Department of Health, Education and Welfare, created by the Act to provide scientific assistance to OSHA, did not respond that any emergency existed. Rather, it published in the *Federal Register* for July 6, 1972 (37 *Fed. Reg.* 13285), a notice that it wished to develop "criteria documents" (a

[4] The background of the promulgation of the EI standard was reviewed by OSHA in the preamble to the permanent standard, at 39 *Fed. Reg.* 3756 (Jan. 29, 1974) (see Pet. Appx. at 14a-16a).

normal step in the formulation of permanent standards) on fifteen chemicals, including EI. NIOSH said it believed these chemicals were "known or suspected carcinogenic substances", and that it would welcome information on these substances within the following ninety days.

On December 29, 1972, the Health Research Group and the Oil, Chemical & Atomic Workers International Union ("HRG-OCAW"), with considerable publicity, petitioned OSHA to issue a single emergency temporary standard covering ten of the fifteen chemicals mentioned by NIOSH's July 6, 1972, notice in the *Federal Register*. The HRG-OCAW petition proposed a standard of a sort, *i.e.*, it "propose[d] a standard of zero tolerance permitting no exposure whatsoever". Pet. Appx. at 20a. It did not include EI within the group of ten chemicals to be subject to the broad zero tolerance standard. On February 9, 1973, OSHA published in the *Federal Register* notice of the filing of the HRG-OCAW petition, along with the standard proposed in their petition. OSHA invited public comment by March 11, 1973, on the petition and on the ten chemicals named in it (38 *Fed. Reg.* 4037).

On April 17, 1973, HRG-OCAW brought a well-publicized suit to compel OSHA to issue an emergency temporary standard for the ten chemicals (not including EI) listed in the petition filed with OSHA. *Oil, Chemical & Atomic Workers International Union* v. *Brennan,* Civil Action No. 730-73 (D.D.C., filed April 17, 1973). Shortly thereafter, OSHA did issue an emergency standard, dated April 26, 1973, and published May 3, 1973, at 38 *Fed. Reg.* 10929. The OSHA emergency standard covered fourteen chemicals, including four chemicals, among them EI, which were not

mentioned in the HRG-OCAW petition. The emergency standard imposed a set of uniform requirements, applicable alike to each of the listed chemicals. Thus, it adopted the format of the HRG-OCAW petition, but it did not adopt the zero-tolerance standard set out in the petition.

Thereafter, Petitions for Review of the emergency temporary standard were filed in the United States Court of Appeals for the Third Circuit by interested chemical industry trade associations and a number of individual chemical companies, and by HRG-OCAW. In *Dry Color Mfrs.' Ass'n* v. *Department of Labor,* 486 F.2d 98 (3d Cir. 1973), the Third Circuit vacated the emergency temporary standard as to EI and as to 3,3'-dichlorobenzidine ("DCB") and remanded the proceedings to OSHA. The court held that the statement of reasons and findings of fact proffered by OSHA to support the emergency temporary standard were inadequate, and that it was adopting the remedy of vacating the standard "[i]n view of our considerable doubts as to whether there is sufficient evidence in the record to support the finding that DCB and EI are carcinogenic in man. . . ." (486 F.2d at 107 n.13.) HRG-OCAW had contended that the Court should require OSHA to incorporate a use-permit system which would achieve zero exposure. The court found it unnecessary to address this contention in light of its disposition of the case. (486 F.2d at 108 & n.18.)

B. Administrative Proceedings for the Permanent Standard

Section 6(c)(3) of the Act (29 U.S.C. § 655(c)(3)) requires OSHA to adopt a permanent standard within six months of issuance of an emergency temporary standard and provides that the temporary standard as published shall serve as a proposed rule for the rule-

making proceeding. OSHA had begun to take the procedural steps required to arrive at a permanent standard prior to the Third Circuit's decision of October 4, 1973, in the *Dry Color* case.

OSHA issued the emergency temporary standard as a proposed permanent standard. Written comments were invited. The rulemaking proceeding also involved the formation of an advisory committee which, as the Third Circuit subsequently said, "was instructed that only one set of standards would be promulgated for all fourteen chemicals, despite the substantial differences in their properties and their industrial and laboratory uses." (Pet. Appx. at 8a.) The advisory committee submitted its recommendation to OSHA, and these recommendations were published in the *Federal Register* on September 7, 1973. Public hearings were commenced immediately thereafter on September 11, 1973. (Pet. Appx. at 6a.)

On November 29, 1973, by which date permanent standards had not yet issued, HRG-OCAW again brought an action for a declaratory judgment and mandatory injunction against OSHA, alleging that it had wrongfully failed to issue a permanent standard or, alternatively, to revoke the emergency temporary standard, within six months as required by Section 6(c)(3) of the Act. *Oil, Chemical & Atomic Workers International Union* v. *Brennan,* Civil Action No. 2127-73 (D.D.C., filed November 29, 1973). HRG-OCAW thereafter filed a motion for summary judgment, which was set for hearing on January 29, 1974. On that date, permanent standards were published in the *Federal Register* for fourteen different chemicals, including EI, and the lawsuit was no longer prosecuted. The permanent standards took the form of separate stan-

dards for each chemical although as the Third Circuit noted "[m]uch of the language, however, in the separate standards is merely duplication of that governing all of the other chemicals". (Pet. Appx. at 8a.) The individual standards were also very similar in substance to the emergency standard.

After OSHA issued these permanent standards, three separate Petitions for Review were filed in the Court of Appeals for the Third Circuit—by the Synthetic Organic Chemical Manufacturers Association ("SOCMA") along with other interested trade associations and individual companies,[5] by HRG-OCAW, and by the Polyurethane Manufacturers Association ("PMA"). The petitioners in the Court of Appeals joined with OSHA to stipulate and move for consolidation of the actions. SOCMA then sought a stay of the EI standard. At the hearing on the stay motion, the Third Circuit panel *sua sponte* ordered that consideration of the EI standard be expedited and be severed from the rest of the consolidated cases. The Court then issued a stay of the EI standard pending its disposition on the merits.

C. The Decisions of the Court of Appeals

1. *The EI Decision*

In its first decision,[6] issued on August 26, 1974, the Third Circuit considered the validity of the OSHA

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[5] This group of petitioners in the Third Circuit will be collectively referred to in this brief as "SOCMA".

[6] *Synthetic Organic Chemical Mfrs. Ass'n* v. *Brennan*, 503 F.2d 1155 (3d Cir. 1974), *cert. denied*, — U.S. —, 95 S. Ct. 847 (1975).

standard for EI. SOCMA, HRG-OCAW, and OSHA had each filed briefs and participated in oral argument on this phase of the case. The decision to a large extent concerns itself with the scope of review mandated by subsection 6(f) of the Act, 29 U.S.C. § 655(f). That subsection requires that an OSHA standard be "supported by substantial evidence in the record considered as a whole". The Third Circuit admitted that "[i]t is clear that application of the substantial evidence test to informal rulemaking was a deliberate legislative compromise between the House and Senate versions of the bill which became law" (503 F.2d at 1158). Nonetheless, the court ruled that a narrower standard of review was appropriate for what it called "legislative policy decisions" by the Secretary. The court apparently was of the view that with respect to such "policy" decisions the statutory substantial evidence criterion is not applicable and held that it is sufficient for OSHA merely to demonstrate that it has considered the "factors relevant under the statute" and "presently available alternatives" before reaching a decision (503 F.2d at 1160).

Then, despite the factual nature of the questions posed respecting whether EI should be regulated as a carcinogen based on "potential", the court applied its very limited test of review for "policy" questions. It thus did not review the evidence in the record respecting any "potential", nor did it review the countervailing evidence in the record. In particular, it did not examine whether OSHA had followed its own stated criterion for assessing carcinogenic "potential", even assuming that the adoption of the criterion itself (which occurred in this administrative proceeding)

was a "policy" judgment. The court did vacate the special provisions in the EI standard for laboratories.[7]

2. *The Subsequent Decision*

Thereafter, the Third Circuit considered the remaining portions of the case. Two of the three judges of the Third Circuit who had heard the EI case were also on the panel of the court hearing the remaining issues. On December 17, 1974, the court rejected a challenge to OSHA's determination to regulate three of the other chemicals among the fourteen subject to the standards. However, the court vacated the standard for one of these chemicals, on the ground that OSHA had not complied with the statutorily-prescribed procedures for use of advisory committees and for publication of and opportunity for comment on proposed or recommended standards.[8]

The court then turned to the HRG-OCAW contentions. HRG-OCAW objected to "the Secretary's erroneous failure to order a performance standard allowing no detectable worker exposure" (Court of Appeals Brief for OCAW-HRG petitioners, at 21),

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[7] The court below vacated the laboratory standard for lack of notice: "We note that there was a lack of notice regarding OSHA's plans to make special provisons regarding EI's use in research laboratories. The Secretary's notice did not advise that the agency planned to make special provisions regarding EI use in laboratories. Because of this, we hold that to the extent that the standards in question relate to research laboratories, they will be vacated and remanded to OSHA." (503 F.2d at 1160.)

[8] The procedural objection was only raised by one petitioner, PMA, with regard to the one chemical, MOCA®. (Pet. Appx. at 5a.)

and recognized that the judgment of OSHA on such a matter would be judged against the test adopted earlier by the court for "policy" matters. (*Id.*) Understandably, the court below considered HRG-OCAW's claim in the zero exposure context, and held that OSHA's decision not to adopt a performance standard based upon zero exposure was "a reasonable exercise of [OSHA's] judgment in the policy-making sphere". (Pet. Appx. at 10a.)

OSHA had deferred imposition of monitoring requirements pending development and identification of analytical "techniques or instruments for environmental monitoring . . . ." (Pet. Appx. at 28a.) The court rejected a challenge to this deferral, remarking that it would not upset a "pragmatic" judgment by OSHA to seek prompt development of monitoring methods "on a priority basis . . . ." (Pet. Appx. at 11a-12a.)

HRG-OCAW had also objected to OSHA's having imposed general requirements for medical surveillance by a physician, contending that the regulations should "prescribe specific medical protocols and diagnostic tests to be given employees who work with the chemicals". (Pet. Appx. at 12a.) Here, the Third Circuit noted that the chemicals varied in their effect and while particular tests for specific chemicals seemed appropriate, OSHA had not called for further study or development. Accordingly, the court remanded each of the fourteen separate standards insofar as medical surveillance was concerned. (Pet. Appx. at 12a-13a.)

ARGUMENT

A. There Are Important Issues Deserving of this Court's Attention

The Occupational Safety and Health Act is a comprehensive piece of legislation with far-reaching impact on the nation's economy, on people's jobs, and on safety in the workplace. The Secretary of Labor's responsibilities in setting occupational safety and health standards are the cornerstone of this legislation, and as such proper promulgation of these standards and subsequent careful judicial review are of considerable importance to the nation.

This case involves a set of such regulations. As one might expect, these particular regulations in their own right have an impact on a substantial number of industrial operations, as well as governmental, research, and educational activities. Many more regulations of a similar nature can be expected in the future.[9] Accordingly, the issues posed by the Petition here and by the earlier Petition in No. 74-789 take on an added importance.

The bifurcated proceedings in the Third Circuit have served to sift out and to sharpen three legal questions respecting which disagreement among the parties still remains. Two of those questions are posed in this Petition. They are in over-simplified terms (1) whether OSHA was required by the Act to frame the regulations in terms of a "performance" requirement or standard and not a "work practice" standard, and (2) whether it was "appropriate" under the Act for OSHA to defer

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[9] OSHA has announced plans to set standards for 386 chemicals in 23 chemical groups, with regulations similar to those at issue here, over the next two years. 4 Occup. Safety & Health Rep. 732, 752-59 (Nov. 21, 1974). The Petition at pages 20-21 also describes OSHA's planned rulemaking efforts for other chemicals.

inclusion of provisions for monitoring in standards for particular chemicals pending technological development and identification of monitoring measures. The third question was presented by the Petition in No. 74-789 which this Court denied on March 17, 1975, *i.e.*, (3) whether the Act's provisions for judicial review under the substantial evidence test should be construed as restricting review of "policy" issues, including such factual issues as whether OSHA correctly applied its own criterion for determining carcinogenic "potential". Each of these legal issues necessarily is presented on the factual base provided by the administrative proceedings. However, these legal issues do not depend for their resolution upon technical determinations, so they would not involve the Court in complex scientific matters.

The SOCMA respondents suggest that this Court should either grant petitions for writs of certiorari to hear all three issues, or it should hear none of them. Because of the Third Circuit's bifurcation of issues in the consolidated cases, this Court has already been presented with the scope-of-judicial-review issue in the prior Petition (No. 74-789). To enable the Court to consider together each of the three aforementioned interrelated issues, with this Brief in Opposition to the present Petition the SOCMA respondents have filed concurrently a Petition for Rehearing of the Order Denying Certiorari in No. 74-789.

B. HRG-OCAW Improperly Seek To Frame In the Abstract Questions Respecting Whether the OSHA Regulations Are Appropriate "Performance" Standards Under the Act

The HRG-OCAW petitioners would present this Court with the abstract question of whether OSHA improperly adopted for each of the fourteen chemicals

being regulated a standard based largely on "work practices" as contrasted to a "performance" standard. The HRG-OCAW petitioners say that "section 6(b)(5) and 6(b)(7) [of the Act] *required* a performance standard, monitoring, and medical surveillance, as well as appropriate protective equipment, labels, and warnings". (Petition, at 14 (emphasis added).) HRG-OCAW say the Third Circuit refused to focus on this abstract performance-standard requirement, viewing instead, and mistakenly, the question before it as whether a particular performance standard (zero exposure) was required.

There are three insurmountable difficulties with the present HRG-OCAW position. First, the present standard is in fact a "performance standard"; there is nothing in the Act to indicate that a "work practice" standard is not a performance standard within the meaning of the Act. Second, HRG-OCAW has always heretofore in these proceedings framed the issue in terms of a specific, zero-exposure requirement, a requirement which it called a performance standard. And, third, even in the abstract the Act specifically gives OSHA authority to adopt regulations based upon requirements other than a performance standard. (Section 6(b)(5).)

1. *The Present Standards Are "Expressed In Terms of Objective Criteria And of the Performance Desired", Within the Meaning of the Act.*

The Act simply says "[w]henever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired". (Section 6(b)(5).) HRG-OCAW would transmute this sentence into a strict command to issue one particular

kind of "performance" standard, *i.e.,* a regulation stated in terms of a numerical limit on the quantity of a given substance in the air, or in a liquid or solid mixture.

The Act is not nearly so restrictive. Here, the standard is in fact "expressed in terms of objective criteria". For example, the objective criteria in the regulations for EI include requirements for closed vessels for chemical reactors, negative-pressure (vacuum) systems for transfer of materials, air scrubbers, glove boxes, closed sampling ports, restricted areas, protective clothing and respirators, and decontamination measures. The standard applies to EI manufacture, processing, repackaging, release, handling or storage, except respecting solid or liquid mixtures of less than 1% EI.

Moreover, there is nothing in the Act to indicate that these are not also requirements which express the "performance desired".

The legislative history of the Act contains a few valuable clues as to what Congress intended in directing OSHA "whenever practicable" to express its standard in terms of "objective criteria" and of the "performance desired". In the 91st Congress, the initial bills to enact a health and safety law in both the House and Senate were split between those calling for standard-setting by the Secretary of Labor [10] and those relying upon an Occupational Safety and Health Board.[11] The debate in both the House and Senate focussed upon the

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[10] *E.g.*, H. R. 843, 91st Cong., 1st Sess. (1969); H. R. 3809, 91st Cong., 1st Sess. (1969); H. R. 4294, 91st Cong., 1st Sess. (1969); S. 2193, 91st Cong., 1st Sess. (1969).

[11] H. R. 13373, 91st Cong., 1st Sess. (1969); S. 4404, 91st Cong., 1st Sess. (1969).

propriety of reposing both the standard-setting authority and the enforcement authority in the Secretary of Labor.

None of the early bills contained provisions equivalent to the Act's present direction to state standards in terms of "objective criteria" and "performance desired". The provision first appeared in the bill reported out of the House Committee on Education and Labor. See H. R. Rep. No. 91-1291, 91st Cong., 2d Sess. at 4 (section 7(a)(4)), 18-19 (1970). However, the provision was omitted from the floor substitute for the Committee bill, which substitute passed the House on November 24, 1970. 116 Cong. Rec. 38,723-38,733 (daily ed., November 24, 1970). The House-passed bill called for standards to be set by an independent Board and not by the Secretary of Labor. The bill reported by the Senate Committee on Labor and Public Welfare also had been revised to include the provision requiring specification of "objective criteria" and "performance desired". S. Rep. 91-1282, 91st Cong., 2d Sess. at 7, 29 (1970). The Senate Committee bill called for standards to be set by the Secretary of Labor; the Committee bill passed the Senate without appreciable change. 116 Cong. Rec. 37,632 (daily ed., November 17, 1970). The Conference Committee resolved the differences between the Senate- and House-passed versions in favor of standards set by the Secretary of Labor, but along with the provision under discussion requiring the Secretary to express the standards in objective, definite form. H. R. Rep. No. 91-1765, 91st Cong., 2d Sess. at 4-6, 33-36 (1970) (Conference Report).

Thus, the requirement for objectively-stated and definite standards stemmed from a compromise with provisions giving the Secretary of Labor standard-set-

ting authority.[12] The provision in referring to "objective criteria" and "performance desired" does not call only for regulations to be stated in terms of numerical limits as HRG-OCAW would have it. Rather, the focus is on specificity and objectivity so that persons governed by the standard will know what is expected of them and similarly that enforcement by the Secretary (the standard-setter) can proceed more even-handedly. Given the circumstances, it is no surprise that OSHA considers these very explicit and definite standards to be performance standards within the meaning of paragraph 6(b)(5) of the Act.[13]

OSHA's standards might indeed be objectionable, but not on the ground that they somehow are not "objective" or do not state the "performance desired".

2. *HRG-OCAW Has Heretofore Always Framed the "Performance" Standard Issue In Terms of A "Zero Exposure"*

Throughout the proceedings before OSHA and before the Third Circuit, HRG-OCAW did not contend that a performance standard as a generic matter was superior to or more appropriate than a work-practice standard

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[12] This is the same compromise that produced the substantial-evidence criterion for judicial review of OSHA's rulemaking orders, which criterion was the subject of the Petition in No. 74-789. See the discussion of the judicial-review aspects of the compromise *supra*, at 9; see also *Associated Industries of New York State* v. *Department of Labor*, 487 F.2d 342, 348-349 (2d Cir. 1973) (opinion by Friendly, J.).

[13] See Occupational Safety and Health Administration, *Draft Environmental Impact Statement On Proposed Regulation: Handling Of Certain Carcinogens*, at 20 ("The ETS [emergency temporary standard] is a performance standard . . . .") (May 3, 1970).

or other requirement. Rather, HRG-OCAW always argued for a zero-tolerance standard, which is a performance standard, albeit an extreme one. Initially, in early 1972 when HRG-OCAW filed with OSHA its petition for an emergency standard it framed its single proposed standard applicable across-the-board to each of ten chemicals in terms of a zero-exposure standard, not in terms of a general performance standard. (Pet. Appx. at 20a.) And, thereafter, in the proceedings leading to adoption of the permanent standard, HRG-OCAW supported instructions to the advisory committee that it consider only one standard for all fourteen chemicals (see *supra,* at 7; Pet. Appx. at 20a-22a), and argued that the one standard should be a zero-exposure standard.

Then in the Third Circuit, HRG-OCAW similarly objected to "the Secretary's erroneous failure to order a performance standard allowing no detectable level of exposure" (Court of Appeals Brief for HRG-OCAW Petitioners, at 21). They also explicitly stated to the Third Circuit that

> "The standard [HRG-OCAW] sought is not a guarantee that no exposure will ever result. It is, however, a performance objective whose purpose is to eliminate all measurable exposure which results from the design and forseeable operation of a process." (*Id.* at 30.)

And, further, HRG-OCAW told the Third Circuit:

> "Perhaps the greatest irony respecting respondent's [OSHA's] refusal to adopt a no measurable exposure performance standard is that his final standards did include a type of performance standard in the exemptions from regulation for certain mixtures containing these carcinogens—precisely

> the action which he concluded the record would not support. Thus, the Secretary concluded that for eight of the chemicals, mixtures containing less than one percent of the chemical would be exempt from regulation and for the other six the exemption is set at 0.1%." (*Id.* at 31.)

Given this background of OCAW-HRG's petitions to OSHA, positions expressed in the permanent rulemaking proceeding, and arguments to the Third Circuit, neither OSHA nor the court below should be faulted for considering the HRG-OCAW petitioners' claims in terms of a zero-exposure or no-detectible-level standard.

3. *The Act Explicitly Grants Discretion To OSHA To Adopt A Performance Standard Or To Employ A Substitute*

In pertinent part, paragraph 6(b)(5) of the Act requires OSHA to consider a performance standard, but at the same time grants OSHA discretion to adopt a substitute:

> "*Whenever practicable,* the standard promulgated shall be *expressed in terms of objective criteria* and of *the performance desired.*" (Emphasis added.)

Here, OSHA found that it was not "practicable" to adopt the zero-exposure "performance" standard advocated by HRG-OCAW, because "no possible exposure to the carcinogens under any circumstances could only be guaranteed by a total ban on the manufacture, use (even for cancer research), and transportation of the substances". (Pet. Appx. at 21a.)

On the administrative record, OSHA said "a safe level of human exposure to any of the 14 carcinogens cannot be established by application of present knowl-

edge". (Pet. Appx. at 20a.) Yet, on the other hand, OSHA also said

> "*a conclusion that safe levels do not exist seems questionable* in view of other studies, some in the area of carcinogenicity which demonstrated that below a certain amount of a single or cumulative dosage, no detectible harm is caused, or if harm is caused, the extent of such harm will be of no practicable importance because the latency period prior to manifestation of harmful effects will be of greater duration than the normal lifespan of man." (*Id.* at 21a (emphasis added).)

In such circumstances, where the precise acceptable levels of exposure were debatable as a scientific matter, OSHA properly could rely on "work practice" requirements to mandate reduction of exposure to the regulated chemicals to appropriate minimal levels:

> "Accordingly, the intent of the standards is to reduce exposure of workers to any of the listed substances to the maximum extent practicable consistent with continued use." (*Id.* at 21a.)

This constitutes one of the circumstances contemplated by Congress where OSHA could properly exercise the discretion given in paragraph 6(b)(5) of the Act to determine a performance standard that was "practicable".

As noted, the Third Circuit understandably did not address the general and rather abstract issue of whether the particular standards OSHA adopted were performance standards or, if they were not, were they "practicable" alternatives, because the issue was not presented to it. In the SOCMA respondents' view the OCAW-HRG petitioners in this Court have framed the performance-standard issue in expansive terms in an effort

to gain yet "another bite at the apple", *i.e.*, OCAW-HRG remains interested in pressing for zero-exposure, but at this juncture they must approach the matter backhandedly by presenting the abstract issue of performance standard versus work practice standard.

4. *Experience With OSHA's Prior Regulation Of EI As An Air Contaminant Was Not Properly Evaluated By OSHA In The Rulemaking Proceedings, But The HRG-OCAW Petitioners Seek To Draw An Erroneous Conclusion From This Impropriety*

In the Petition, HRG-OCAW point out that shortly after OSHA's creation, OSHA had adopted numerical performance standards for nearly 400 chemicals and substances as air contaminants. (Petition at 11 n.11, 17.) HRG-OCAW criticize the Third Circuit for not requiring OSHA to evaluate the experience under these air contaminant standards in deciding whether or not to rely on performance standards in these regulations. In SOCMA's view, criticism is warranted but not for the reasons HRG-OCAW suggest.

The 400 air contaminant standards had originally been issued under the Walsh-Healey Act, 41 U.S.C. §§ 35-45. The Occupational Safety and Health Act in subsection 6(a) authorized OSHA to "promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard. . . ." Under subsection 6(a), OSHA could promulgate such standards without complying with the procedural requirements of the Administrative Procedure Act or of the Occupational Safety and Health Act itself. This special authority was limited in time to a period extending for two years from enactment. OSHA had deemed the Walsh-Healey Act standards to

be "national consensus standards" and had adopted them as its own standards under subsection 6(a). They were (and are) codified as 29 C.F.R. § 1910.93, Tables G-1, G-2 & G-3 (1974).

The air contaminant standards included standards for a couple of the fourteen chemicals. Importantly, such a standard was in existence for EI. Somewhat curiously, the EI air contaminant standard is still effective. Under 29 C.F.R. § 1910.93, Table G-1, an employee's exposure to ethyleneimine is limited to an eight-hour time weighted average of 0.5 ppm (parts per million) and 1 mg/M^3 (milligram per cubic meter) of EI in air in any eight-hour work shift of a forty-hour work week.

SOCMA agrees with OCAW-HRG that in adopting its new regulation for EI, OSHA had to consider "experience gained under this and other health and safety laws . . ." (§ 6(b)(5)), including particularly experience under the EI air contaminant standard. Indeed, paragraph 6(b)(8) of the Act goes even further and explicitly requires OSHA to include in its *Federal Register* publication of a rulemaking order a statement of reasons why the new standard should be adopted to replace the national consensus standard:

> "Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, *the Secretary shall*, at the same time, *publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.*" (§ 6(b)(8) (emphasis added).)

OSHA did not even colorably comply with the requirement of paragraph 6(b)(8).[14]

But the point to be drawn from OSHA's derelictions is not that a numerical standard rather than a work-practice standard had to be adopted for EI, and also for the other 13 chemicals. The air contaminant standard for EI stood alone. It was not backed up by other control measures, such as protective clothing and personal equipment requirements, mandatory specification of regulated areas, required labels and warning signs, special decontamination steps, required reports, and medical surveillance. What OSHA has done in the standards for the fourteen chemicals including EI is to rely in large part on work practice requirements, but to build in a large number of redundant or back-up control measures, all of which taken together operate, as OSHA said, "to reduce exposure of workers . . . to the maximum extent practicable consistent with continued use." (Pet. Appx. at 21a.)

In contrast to HRG-OCAW, in SOCMA's view OSHA should have looked carefully at the experience under the air contaminant standard for the purpose of evaluating whether a further and new regulation of EI was needed at all. That inquiry is what paragraph 6(b)(8) intends and indeed requires. To SOCMA's knowledge there have been no adverse em-

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[14] SOCMA raised the issue of this default in briefs to the Third Circuit (Court of Appeals Brief for SOCMA Petitioners on EI, at 24, 51-52), but that court did not see fit to address the question.

ployee health effects due to EI; the air contaminant standard has provided adequate regulation.[15]

In large part, OSHA never focussed on its experience with the air contaminant standards for EI because HRG-OCAW insisted on one single standard for all of the fourteen chemicals despite the obvious differences in physical properties, chemical characteristics, and toxic, carcinogenic or other health effects. HRG-OCAW should not now be heard to complain of a failure by OSHA to look at experience with prior regulations for EI, and especially it should not use that failure as a prop for a general argument in support of a "performance standard".

C. The Act Does Not Require OSHA To Promulgate Monitoring Requirements At This Particular Time When Such Requirements Have Not Yet Been Developed Or Identified

OSHA specifically noted in its rulemaking order that it had not incorporated in each or any of the standards "provisions for specific techniques or instruments for environmental monitoring". (Pet. Appx. at 28a.) It had, however, asked the National Institute for Occupational Safety & Health ("NIOSH") to develop such provisions "on a priority basis". (*Id.*) HRG-OCAW complain that the Third Circuit improperly sanctioned such an arrangement for deferred promulgation of monitoring provisions. HRG-OCAW assert that para-

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[15] EI is a strong blistering agent and must be handled with great care. The SOCMA respondents remain of the view that it is not a carcinogen, nor does it meet OSHA's criterion for denomination as a substance with carcinogenic "potential". Because the Third Circuit adopted such a limited standard of review that it could not consider whether EI in fact meets OSHA's own criterion, SOCMA has submitted concurrently with this Brief a Petition for Rehearing of Order Denying Certiorari in No. 74-789.

graph 6(b)(7) of the Act requires promulgation of monitoring provisions contemporaneously with the other portions of the standards.

In pertinent part, paragraph 6(b)(7) says: "*Where appropriate,* . . . such standard shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees." (Emphasis added.)

The Third Circuit got to the heart of the matter when it said simply that OSHA had "deferred implementation of monitoring requirements pending further scientific development of methods for doing so". (Pet. Appx. at 12a.) The court said it would not disturb such a "pragmatic" decision by OSHA.

The SOCMA respondents agree with the Third Circuit on this issue. Where no monitoring measures had yet been developed or identified,[16] it could not be "appropriate" under paragraph 6(b)(7) to provide for such measures in the standards.[17]

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[16] In addition, OCAW-HRG certainly have not identified any such monitoring techniques for any of the fourteen chemicals.

[17] In Occupational Safety and Health Administration, *Supplement To Final Environmental Impact Statement On Proposed Regulation: Handling Of Certain Carcinogens,* the Agency stated:

> "No opposition to the concept of monitoring has been expressed during the consideration of the proposed standards; the major problems raised relate to the degree of sensitivity to be required, and the present unavailability of reliable monitors.
>
> "The Director of the Division of Laboratories, National Institute for Occupational Safety and Health, estimates that it will take approximately two years to develop methods for all 14 carcinogens which will be suitable for general use at the ppb (parts per billion) level . . . ." (*Id.* at 65.)

Again, much of the present trouble stems from HRG-OCAW's insistence on one standard to cover all fourteen chemicals. Because of the diversity of the chemicals, no one monitoring method or group of methods was satisfactory. As the Third Circuit noted, the entire rulemaking proceeding was adversely affected by OSHA's adoption of HRG-OCAW's one-standard-for-all approach right up to the time the final standard was issued:

> "[T]he value of notice and comment from interested parties in a hearing for rulemaking was not realized in this case. As an example, the advisory committee was instructed that only one set of standards would be promulgated for all fourteen chemicals, despite the substantial differences in their properties and their industrial and laboratory uses. After the public hearings had been concluded, however, the Secretary issued separate standards for each chemical. Had the proposed rule recited the separate standards, the presentation of pertinent objections, comments and data would have made the public hearings far more valuable to all concerned." (Pet. Appx. at 8a (footnotes omitted).)

Then too, monitoring requirements in a work practice standard provide a back-up or redundant protection. The immediate presence of every single safeguard or back-up system of protection is not essential or necessary to the successful implementation of the standards. OCAW-HRG imply that stringent enforcement of standards is extremely difficult without the monitoring requirement. (Petition at 22.) This contention is factually incorrect in these circumstances. The work practice requirements are all visually observable. Inspectors have had and will have no dif-

ficulty in determining compliance with requirements for closed vessels for chemical reactions, negative-pressure (vacuum) systems for transfer of materials, air scrubbers, glove boxes, closed sampling ports, restricted areas, protective clothing and decontamination measures.

CONCLUSION

In the view of the SOCMA respondents, OSHA's proceedings were faulty, and the Third Circuit failed to follow the requirements of Section 6 of the Act in reviewing the proceedings. Thus, the SOCMA respondents have a small measure of agreement with the HRG-OCAW petitioners, even though the SOCMA respondents certainly disagree with the HRG-OCAW petitioners respecting which aspects of the administrative proceedings and of the court's review were faulty.

The standards which are the subject of this case are the forerunners for numerous such standards to be developed in the future. It is consequently quite important to OSHA and to those affected by its regulations and standards that the judiciary through discerning review provide a satisfactory assessment of those standards.

Unfortunately, the bifurcated Third Circuit proceedings have led to piecemeal presentation of important issues to this Court. Now, however, the Court has an opportunity to examine the three legal issues arising from the totality of the Third Circuit's proceedings. In the view of the SOCMA respondents, the two questions posed by this Petition are worthy of this Court's attention, *if* the Court combines them with the single question respecting scope of review presented by the Petition in No. 74-789. To enable the Court to

consider the scope of review issue in No. 74-789 with the questions presented here, the SOCMA respondents submit concurrently a Petition for Rehearing of the Order Denying Certiorari in No. 74-789. Each of the three questions posed raises a legal issue which does not require an extensive examination of the technical matters raised in the court below. In addition, each of the three questions concerns the legislative compromise made by Congress when it conferred standard-setting authority on the Secretary of Labor but hedged that authority with procedural and substantive safeguards. Thus, the questions logically belong together and should be considered by this Court with each other.

Certiorari should be denied if the Court does not wish to consider the questions posed here with the one issue presented in No. 74-789.

Respectfully submitted,

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APPENDIX

APPENDIX A

Statutes Involved

Occupational Safety and Health Act. Section 6 of the Occupational Safety and Health Act (29 U.S.C. § 655 (1970)) provides as follows:

> (a) Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.
>
> (b) The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:
>
> (1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health, Education, and Welfare, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this Act, the Secretary may request the recommendations of an advisory com-

mittee appointed under section 7 of this Act. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health, Education, and Welfare, together with all pertinent factual information developed by the Secretary or the Secretary of Health, Education, and Welfare, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a

hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall

be expressed in terms of objective criteria and of the performance desired.

(6)(A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided*, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from the which employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health, Education, and

Welfare certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health, Education, and Welfare designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health, Education, and Welfare, such examinations may be furnished at the expense of the Secretary of Health, Education, and Welfare. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health, Education, and Welfare, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health, Education, and Welfare, may by rule promulgated pursuant to section 553 of title 5,

United States Code, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard.

(c)(1) The Secretary shall provide, without regard to the requirements of chapter 5, title 5, United States Code, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with section 6(b) of this Act, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency

standard as provided in paragraph (2) of this subsection.

(d) Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(e) Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this Act, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

(f) Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is pro-

mulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health, Education, and Welfare regarding the need for mandatory standards in determining the priority for establishing such standards.